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In The

Supreme Court of the United States

October Term, 1974

No. 74-5394

EVERETT AUGUSTUS SCALES,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Virginia

---

BRIEF FOR RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The respondent, Commonwealth of Virginia, respectfully prays that a Writ of Certiorari to the judgment of the Supreme Court of Virginia entered in this case on April 22, 1974, with the Petition for Rehearing being denied by Order of June 10, 1974, not be granted.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia is reported as *Scales* v. *Commonwealth*, 214 Va. 728, ... S.E.2d ..... (1974), and is set forth in the Appendix to the Petition for a Writ of Certiorari. The opinion of the Supreme Court of Virginia denying the Petition for Rehearing is unreported, but it is set forth in Appendix A to the Petition for Writ of Certiorari previously filed in the case.

JURISDICTION

The petitioner asserts that the jurisdiction of this Court to issue the Writ of Certiorari is grounded upon 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I.

Is The Systematic And Intentional Exclusion Of Significant, Identifiable And Eligible Segments Of The Community From A State Grand Jury Venire, I.E., All Residents Between The Age Of 21 And 40, Women, Poor Or Moderately Incomed, Blue Collar Workers, Inconsistent With The Cross-Section Requirements Of Grand Jury Selection And Violative Of The Fourteenth Amendment Of The United States Constitution, And Does Disproportionate Under-Representation Of These Groups Constitute A Prima Facie Case Of Discrimination?

II.

Does The Systematic And Intentional Inclusion Of An "Old Guard" Socio-Economic Elite, All Of Whom Are Personal Friends Of The Selecting Judge, On A State Grand Jury, Whose Distinguishing Characteristics Of Age, Sex, Long-Time Community Residency, Occupation, Educational Attainment, Real Estate Holdings And Personal Wealth, Are In Every Significant Respect Clearly Different From Those Of A Cross-Section Of The Community, Violate The Fourteenth Amendment Of The United States Constitution?

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved in the instant case are fully set out in Appendix C to the Petition for a Writ of Certiorari previously filed with this Court.

STATEMENT OF THE CASE

Since the issue presently before the Court relates solely to a Motion to Quash the Indictment filed on behalf of the defendant, no attempt will be made herein to discuss the facts relevant to the charge of which defendant was convicted, but the relation of facts here will be limited to the procedural steps connected with the Motion to Quash the Indictment and the facts adduced at a prior hearing relevant to that motion.

The defendant was indicted on January 31, 1972, on a two count indictment, one count charging distribution of a controlled drug and the other charging possession of a controlled drug, in both instances heroin. The defendant thereafter filed a Motion to Quash the Indictment on the ground the "said Indictments were returned by a Grand Jury which was empaneled in contravention of the Federal and State Constitutions and the laws of Virginia." The defendant's initial trial was on September 26, 1972, and, at the time of arraignment, the defendant made his Motion to Quash the Indictment at which time counsel for the defendant and the Assistant Commonwealth's Attorney stipulated that the evidence which had previously been taken in the case of *Commonwealth* v. *Peterson, et als.*, would apply and at that time the trial judge reaffirmed Judge Sinclair's prior ruling in the *Peterson* case and denied the Motion to Quash the Indictment.

During the trial held on that same date certain evidence was adduced that was ruled inadmissible by the trial court

and, on the defendant's Motion for a Mistrial, the trial judge ruled that a mistrial should be granted and the jury was discharged. The case was thereafter reset for trial on October 4, 1972, and the defendant was rearraigned with no renewal of the Motion to Quash the Indictment. The parties then stipulated that if the witnesses who were called at the first trial in September were recalled their testimony would be identical to that previously given, the defendant then waived trial by jury and the Commonwealth moved that the second count of the indictment as to possession of heroin be "nol prossed." The defendant was thereafter found guilty of distribution of a controlled drug and sentenced to serve ten years in the Virginia State Penitentiary with execution of the sentence being suspended for a period of five years conditioned on him being under the supervision of a probation officer and successfully completing a program at "Second Genesis."

As previously pointed out, the defendant sought at his trial the admission of all testimony and proceedings that had previously taken place during hearings held in the case of *Commonwealth* v. *Peterson, et als.,* which hearings transpired in the Corporation Court of the City of Alexandria on August 14, 15, and 22 of 1972. That hearing related to Motions to Quash the Indictments made on behalf of a number of persons who had been previously indicted, on the ground that the grand juries in the City of Alexandria were improperly composed in that the grand jury selection process resulted in a denial of the Fourteenth Amendment rights of the defendants. During that hearing the grand jury lists for 1967-1968, 1968-1969, 1969-1970, 1970-1971 and 1971-1972 were introduced into evidence and some 47 of the grand jurors appearing on the master grand jury list for the 1971-1972 year appeared and testified. Of the remaining thirteen grand jurors on the 1971-1972 list,

three were deceased, three were excused by agreement and seven failed to respond to the subpoenas. During the course of the hearing the grand jurors who testified responded to questions regarding their sex, race, age, marital status, education, occupation, length of residence in Alexandria and in Virginia and whether they were renting their place of residence or owned a home.

The defendant summarized some of the statistical data from the census figures and from the testimony of the grand jurors in a brief filed in the trial court. Other testimony adduced at the August hearings included the introduction of the grand jury lists for 1967 through 1972, and an employee of the City Assessor's Office also testified in order to present the Land Book with various real estate records relative to the grand jurors.

Judge Franklin P. Backus, the Senior Judge of the then Corporation Court for the City of Alexandria also testified regarding the grand jury selection process and he testified primarily with regard to the 1971-1972 master grand jury list. Judge Backus testified that he prepared a list of sixty persons of honesty, intelligence and good demeanor, and he basically used the current grand jury list for the previous year and added to it or deleted from it "as circumstances may require." He further stated that the list was made up of "men and women, Black and White people, Jews and Christians, Catholics and Protestants." He indicated that he got the names on the list from "many, many sources" and he had "to determine whether the person is honest, intelligent, and of good demeanor." He attempted to come up with a "cross-section" although he did not attempt to select people in exact proportions according to any "mathematical formula" but what he wanted "to have is a representative grand jury." Judge Backus pointed out that the Clerk picked the grand jury from this list and out of every five

people that he selected for the grand jury he could have "one or more people from each of the classifications."

He indicated that age did not enter into his calculations although he obviously was under the impression that several people on the list might have been younger than thirty-five. Judge Backus stated that he made no effort to consider home ownership, length of residence in Alexandria or income. He also did not attempt to reflect the mathematical proportion of blacks in the population of Alexandria when selecting the grand jury. He knew most or all of the people on the 1971-1972 list either personally or by reputation in that he felt that this was necessary in order to judge whether they were honest or intelligent. Judge Backus was of the opinion that the list did not represent a cross-section of the community on the basis of age or sex, and he was not familiar with the status of the members of the grand jury as to ownership of homes or economic well-being; but he did believe that the master grand jury list represented a cross-section of the population of Alexandria as to occupations, education and race. Further testimony produced the fact that all of the persons selected for the master grand jury list were qualified under the statute and that Judge Backus had complied exactly with the Code of Virginia in making his selections, a fact that the defendant specifically did not contest and is not contesting here. Judge Backus did try to take into account a religious cross-section of the City as well. Finally, Judge Backus testified that he was not choosing the "grand old families of the City," but he knew everyone on the list at least well enough to say good morning to. He agreed that there was a substantial number of people on the list that he would regard as his "intimate personal friends," but it was a substantially smaller number than those to whom he would merely say "good day."

No evidence whatsoever was adduced at either the *Peterson* hearing or at the trial in this case as to the composition of individual grand jury panels or regarding the composition of the grand jury that indicted this defendant.

The Supreme Court of Virginia granted a Writ of Error to the petitioner herein and the matter was briefed and orally argued before that Court and a decision rendered on April 22, 1974, in the case styled *Scales* v. *Commonwealth, supra.* A Petition for Rehearing was denied by that Court on June 10, 1974, and the instant Petition for a Writ of Certiorari was filed in this Honorable Court on October 8, 1974, pursuant to an Order granting an extension of time to file said Petition issued by this Court.

STATEMENT OF FACTS

Since the issues involved in this case relate solely to the question of the composition and selection process of grand juries in the City of Alexandria, Virginia, the facts involved in petitioner's crime are not relevant and all of the significant facts relative to the issues raised herein have been outlined in the Statement of the Case.

ARGUMENT

The Supreme Court Of Virginia Properly Ruled That As To The Grand Jury Selection Process There Is No Cross-Sectional Principle Mandated As A Matter Of Federal Constitutional Law On The States And In The Absence Of Any Claim That There Was Any Systematic And Intentional Exclusion Of Class Representatives On Petitioner's Grand Jury And, In Fact, Where There Was No Evidence Whatsoever Of The Composition Of Petitioner's Grand Jury, The Petition For A Writ Of Certiorari Should Be Denied.

The Petition for a Writ of Certiorari in this case includes, as a part of the section of that Petition entitled

Statement of the Case, an extensive discussion of Virginia political history with the clear inference that the grand jury selection process in the City of Alexandria, Virginia, was dictated by some mysterious back room machinations of the "Byrd Machine," an argument that is based on no evidence whatsoever apparent in the record of this case. This argument is being made for the first time in this Court and, as a matter of fact, the petitioner has consistently stated that he "does not contend that Section 19.1-148 is unconstitutional nor that Judge Backus did not follow its mandates." (Brief for Appellant in Supreme Court of Virginia, pg. X.) The Supreme Court of Virginia acknowledged this prior frankness on the part of petitioner during the course of their opinion:

> "It is admitted that there was no discrimination here because of race, color, creed or religion. Counsel for the defendant conceded that Judge Backus, in constituting the grand jury list for the City of Alexandria, complied fully with the statutes of Virginia and selected qualified citizens who were honest, intelligent and of good demeanor. Defendant admitted *that the disparities he claims did not rise from any purposeful or deliberate discrimination and that the grand jury selection system used in Alexandria was administered in good faith.* The evidence established that the citizens selected came proportionally from the eight wards of the city, thereby providing a broad geographical base. Members of both sexes were selected, as were black and white citizens and members of all religious faiths. There were representatives on the list from each classification to which the defendant took exception. In fact, the grand jury that indicted defendant may have included a member of each class which defendant claims is underrepresented.
>
> "The defendant neither claimed nor attempted to show intentional and purposeful exclusion of any class,

> and he has shown none that was prejudicial to him. Absent such a showing his challenge of the judgment of the court below must fail." (214 Va. at 731.)

Thus, this Honorable Court should consider the petitioner's allegations relative to the motivation behind the grand jury selection process in light of the fact that these allegations were not raised prior to the instant proceeding in this Court.

The defendant raises several questions with regard to the validity of the grand jury selection process in Alexandria and the Commonwealth will deal with each of those questions seriatim below, but there are certain general observations that should be discussed first. Initially, it must be kept in mind that the attack being made here is solely against the grand jury selection process and does not involve the process for the selection of petit juries in Alexandria; second, the defendant does not contest the constitutionality of Virginia's grand jury selection statutes nor that Judge Backus complied with all of these statutes in making his selection of potential grand jurors; and third, the defendant does not at any point challenge the racial composition of the master grand jury list (this absence of such an attack is justified in that nine of the sixty grand jurors on the master list were black for a fifteen percent black representation whereas blacks comprised 11.1% of the population of Alexandria twenty-one years of age and older).

The role of the grand jury in Virginia is an expansive one involving the investigation of the commission of felonies, the conditions in the community and the conduct of public officials (See Comment, *The Grand Jury in Virginia,* 22 Wash. & Lee L. Rev. 325, 326 (1965); Whyte, *Is The Grand Jury Necessary?,* 45 Va. L. Rev. 462 (1959);

§ 19.1-155, Code of Virginia (1950), as amended). Also, unlike most other states, the Constitution of Virginia does not provide for a grand jury and it is only by statute that an indictment or presentment is a necessary prerequisite to a felony trial, unless waived in writing by the defendant (§ 19.1-162, Code of Virginia (1950), as amended). It should also be noted that the statutory standards for a grand juror are somewhat higher than those for a petit juror (Compare § 19.1-148 of the Code with § 8-181 of the Code). Consequently, these higher statutory standards and the broader investigative function of the grand jury may justify a greater exercise of discretion on the part of the selecting judge or agency that may diminish the influence of the cross-sectional concept (See *People* v. *Cohen,* 12 Cal. App. 3d 298, 90 Cal. Rptr. 612, 619-620 (2d Dist. 1970); *People* v. *Hoiland,* 22 Cal. App. 3d 530, 99 Cal. Rptr. 523, 529 (2d Dist. 1971); Mar, *The California Grand Jury: Vestige of Aristocracy,* 1 Pac. L. J. 36, 44-45 (1970); See also *Brown* v. *Allen,* 344 U.S. 443, 473-474 (1953)).

It is well settled that the Thirteenth and Fourteenth Amendments to the United States Constitution, as interpreted by this Honorable Court, prohibit discrimination on the basis of race, color, religion, or national origin in the selection of grand jurors. It not equally well settled that the cross-sectional concept is a constitutional mandate that provides to all the states. This Court has yet to reverse a single conviction on the ground of alleged economic discrimination in the selection of a state grand or petit jury where the racial factor was not also involved. In *Fay* v. *New York,* 332 U.S. 261 (1947), this Court stated that there was no

> ". . . [p]ersuasive reason for dealing with purposeful occupational or economic discriminations if they do exist as presumptive constitutional violations. . . . [W]e must find them such as to deny a fair trial be-

> fore they can be labeled as unconstitutional" (332 U.S. at 292-293.)

The cross-sectional concept is drawn from the decisions of this Court in *Glasser* v. *United States,* 315 U.S. 60 (1942); *Thiel* v. *Southern Pacific Company,* 328 U.S. 217 (1946) and *Ballard* v. *United States,* 329 U.S. 187 (1946), all cases heavily relied on by the defendant in his brief in this Court. However, Mr. Justice Jackson clearly pointed to the inapplicability of *Glasser, Thiel* and *Ballard* to state prosecutions in *Fay* v. *New York, supra:*

> "These defendants rely heavily on arguments drawn from our decisions in *Glasser* v. *United States,* 315 U.S. 60; *Thiel* v. *Southern Pacific Company,* 328 U.S. 217; and *Ballard* v. *United States,* 329 U.S. 187. The facts in the present case are distinguishable in vital and obvious particulars from those in any of these cases. But those decisions were not constrained by any duty of deference to the authority of the State over local administration of justice. They dealt only with juries in federal courts. Over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in state courts, and these expressions of policy are not necessarily embodied in the concept of due process." (332 U.S. at 287; See also *Benson* v. *Commonwealth,* 190 Va. 744, 748-49, 58 S.E.2d 312 (1950).)

It is equally clear that the case of *United States* v. *Butera,* 420 F.2d 564 (1st Cir. 1970), also heavily relied on by defendant, is similarly predicated upon the particular role of a federal court in exercising its supervisory power over the lower federal courts and in interpreting the federal jury selection statutes. Where state proceedings are concerned, however, this Honorable Court and the lower fed-

eral courts have been primarily concerned with problems of racial discrimination. Justice White pointed out in his concurring opinion in *Peters* v. *Kiff*, 407 U.S. 493 (1972), that he would allow a white man to have standing to attack discrimination against blacks on the basis of race in light of the statutory command of 18 U.S.C. § 243, as that section clearly evinced an intention on the part of Congress to put:

> ". . . cases involving exclusions from jury service on grounds of race 'in a class by themselves . . . for us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination,' *Fay* v. *New York*, 332 U.S. 261, 282-283 (1947)" (407 U.S. at 505-506).

There is thus a significant problem with regard to the applicability of the cross-sectional principle to the states, and particularly to the grand jury selection process, and with the question of standing on the part of a criminal defendant to attack the alleged exclusion of a class from a jury when he or she are not a member of that class.

A.

EVEN ASSUMING ARGUENDO, THAT THE CROSS-SECTIONAL CONCEPT IS APPLICABLE TO THE SELECTION OF GRAND JURORS, THE DEFENDANT HAS NOT ESTABLISHED A DEVIATION FROM THAT CONCEPT BY PRESENTING ONLY STATISTICAL DATA AS TO THE COMPOSITION OF THE MASTER GRAND JURY LIST WITHOUT ANY REFERENCE TO THE COMPOSITION OF INDIVIDUAL GRAND JURIES, INCLUDING THE GRAND JURY THAT INDICTED THIS DEFENDANT.

All of the evidence presented during the *Peterson* hearing, which was the sole evidence relied on by this defendant

at his trial, related essentially to the statistical composition of the master grand jury list for 1971-1972. Although a number of the earlier lists were placed into evidence, no effort was made to present any evidence regarding persons on those lists who did not serve, and were not placed, on the 1971-1972 master grand jury list. In addition, all of the statistical analysis advanced by the defendant relate to the master grand jury list and does not in any way relate to the composition of individual grand juries which served during the year, including the grand jury which indicted this defendant. For example, assuming as true the defendant's evidence that only six of the sixty persons on the master grand jury list for 1971-1972 were women for a representation of ten percent, it would still be possible for two or three of those women to be selected to serve on a particular grand jury of five serving during a term of court, in which event that grand jury would have a forty percent or sixty percent representation of women. This particular question has been addressed recently by the United States Court of Appeals for the Fourth Circuit in the case of *Wansley* v. *Slayton*, 487 F.2d 90 (4th Cir. 1973). In that case the District Court had granted the petitioner's Petition for a Writ of Habeas Corpus and that action was partially based on the District Court's conclusion that there was systematic exclusion of blacks from grand juries in Lynchburg, Virginia. The panel of the United States Court of Appeals for the Fourth Circuit hearing the case reversed and remanded the case to the District Court with instructions that the petition be dismissed. Judge Russell, writing for the Court, made the following relevant observations:

> "The District Court based its finding of disproportionate representation on a statistical analysis of grand jury composition in the Corporation Court for the five

year period 1962-67. This compilation began with May, 1962, about six months before the grand jury returned its indictment of the petitioner. For some reason, no attempt was made to compile figures on grand jury compositions in the five year period prior to petitioner's indictment. This would, it seems, have been the pertinent period to review. But, even under the post-indictment compilation, the petitioner failed to make out a *prima facie* case. According to the compilation offered by the petitioner there were 169 grand jurors selected in this five year period of whom 20 or 12 per cent were black. *The difficulty with this statistic is that it does not purport to show the racial composition of the actual grand juries themselves, as selected over this period. The evidence established that many grand jurors served more than once. It accordingly became evident immediately that the use of the raw numbers of the entire jury list for the five year period, without an examination of the actual juries empanelled is misleading. That many on the list served more than once is established by the record in this case.* Thus, the foreman of the grand jury that indicated the petitioner had served 'four or five times' on the grand jury. Two had been on 'several times.' It must be remembered that the testimony of the court clerk, as well as the affirmation Court Judge, was undisputed that, as long as they had been connected with the Court (which long preceded the indictment of the petitioner and continued long beyond the trial in question), there had been one or more blacks on every grand jury that served. That uncontradicted testimony fixed the pattern of actual selection and it gave no basis in fact for a finding of a 'two to one' disproportion in racial representation. Moreover, under the petitioner's own compilation, the under representation did not meet the '2 to 1' test. The finding of the District Court that the undisputed evidence established a prima facie case of under representation was clearly erroneous." (487 F.2d at 101; emphasis supplied.)

In the absence of such testimony or evidence regarding the composition of individual grand juries, it is impossible to tell whether the defendant has even established a *prima facie* case.

B.

THE DEFENDANT HAD NO STANDING TO ATTACK THE ALLEGED UNDERINCLUSION OF WOMEN ON GRAND JURIES IN ALEXANDRIA.

Even assuming that the defendant has established any under-inclusion of women on grand juries although failing to refer to the composition of any individual grand juries and by relying solely on the composition of the master grand jury list, it is still submitted that the defendant has no standing to raise this question since he is a male. In light of the decision of this Court in *Peters* v. *Kiff, supra,* it is settled that the systematic exclusion of blacks from grand and petit juries may be raised by white defendants on the grounds that they have been denied due process of law, as well as the traditional ground of denial of equal protection of the law in jury discrimination cases. However, the *Peters* case does not give any basis for the reliance on a due process argument on behalf of any person who is not a member of the class allegedly excluded for other than on a racial basis. Consequentely, in the absence of a cross-section rule and in the absence of a racial element, this defendant must rely on the systematic exclusion rule and he must establish his standing as well as the specific prejudice that flowed to him from the systematic exclusion of a class to which he does not belong (See *Eubanks* v. *Louisiana,* 356 U.S. 584 (1958); *People* v. *White,* 43 Cal. 2d 740, 278 P.2d 9 (1954); *Fay* v. *New York, supra,* 332 U.S. at 287; *Salisbury* v. *Grimes,* 406 F.2d 50 (5th Cir. 1969); *Butler* v. *State,* 285 Ala. 387, 232 So.2d 631

(1970); *Blanton* v. *State*, 249 Ark. 181, 458 S.W.2d 373 (1970); *State* v. *Lea*, 228 La. 724, 84 So.2d 169 (1955)). The petitioner here does not demonstrate any particular reason why he should have standing to attack the alleged discrimination against women in the grand jury selection process, nor does he at any point demonstrate any specific prejudice that flowed to him from such alleged discrimination that he asserts resulted from the underinclusion of women on the master grand jury list.

C.

THE DEFENDANT HAS NOT ESTABLISHED A CONSTITUTIONAL RIGHT TO THE REPRESENTATION OF CERTAIN CLASSES OF PERSONS BASED ON AGE OR ECONOMIC CLASS ON A STATE GRAND JURY, NOR HAS HE ESTABLISHED HIS IDENTITY WITH THOSE CLASSES OR ANY SPECIFIC PREJUDICE THAT FLOWED TO HIM FROM THE ALLEGED UNDER-REPRESENTATION OF YOUNGER PERSONS AND PERSONS REPRESENTING THE LOWER ECONOMIC CLASSES ON THE MASTER GRAND JURY LIST.

The defendant's arguments in the portion of his brief relating to the total exclusion of all persons between 21 and 41 years of age on the master grand jury list and the alleged underinclusion of representatives of the lower economic classes on the master grand jury list are based almost exclusively on the rulings of this Honorable Court in *Glasser, Thiel* and *Ballard* and the decision of the United States Court of Appeals for the First Circuit in *Butera*, and the additional decisions in *United States* v. *DiTommaso*, 405 F.2d 385 (4th Cir. 1968) and *United States* v. *Roemig*, 52 F. Supp. 857 (N.D. Iowa 1943). As previously pointed out, all of these cases are based upon the particular role of a federal court in dealing with jury selection in the federal system. However, the majority of courts dealing with the question of age have held that members of an

arbitrarily drawn age group do not necessarily constitute a valid category for measuring the constitutionality of jury selection (*United States* v. *DiTommaso, supra,* at 391 (4th Cir. 1968); *King* v. *United States,* 346 F.2d 123 (1st Cir. 1965); *United States* v. *Gargan,* 314 F. Supp. 414 (W.D. Wis. 1970), aff'd. 457 F.2d 141 (7th Cir. 1971); *Epton* v. *Nenna,* 318 F. Supp. 899 (S.D. N.Y. 1970), *aff'd.,* 446 F.2d 363 (2d Cir. 1971); *Britton* v. *Bullen,* 275 F. Supp. 756 (D. Md. 1967); *People* v. *Hoiland,* 22 Cal. App. 3d 530, 99 Cal. Rptr. 523 (2d Dist. 1971)).

The defendant has also not established at any point that he is a member of either of the classes referred to or that any specific prejudice resulted to him from the alleged exclusion or underrepresentation of these classes, if they indeed be identifiable classes, from the master jury list. The crimes for which he was indicted were certainly not crimes that would have been treated differently by a grand jury composed of different persons than the one which indicted him. At least there is no evidence of record to reflect such a possibly different approach.

D.

THE DEFENDANT HAS NOT AT ANY POINT ESTABLISHED THAT THE ALLEGED EXCLUSION OR UNDER-REPRESENTATION OF VARIOUS CLASSES ON THE MASTER GRAND JURY LIST WAS SYSTEMATIC AND INTENTIONAL, NOR HAS HE ESTABLISHED THE EXISTENCE OF ANY CONSTITUTIONAL GUARANTEE TO ACTUAL OR PROPORTIONAL REPRESENTATION OF PARTICULAR CLASSES ON THE GRAND JURY.

Beginning with *Strauder* v. *West Virginia,* 100 U.S. 303 (1880), this Court has established the principle that complete exclusion from jury service based on racial considerations is contrary to the equal protection clause of the Fourteenth Amendment, with a growing reliance on the

due process clause as well. Traditionally, however, the *Strauder* principle has also stood for the proposition that, with respect to any particular jury, there is no constitutional guarantee of actual or even proportional representation based on the defendant's class or race (*Swain* v. *Alabama,* 380 U.S. 202, 208 (1965); *Cassell* v. *Texas,* 339 U.S. 282, 286-287 (1950); *Akins* v. *Texas,* 325 U.S. 398, 403 (1945)). The law seems only to require that juries not be purposely unrepresentative. A criminal defendant is assured of relief only if the persons entrusted with administering the jury selection system or the statute itself produce either total or near total exclusion of an identifiable segment of the population to which the defendant belonged (*Eubanks* v. *Louisiana,* 356 U.S. 584 (1958); *Reece* v. *Georgia,* 350 U.S. 85 (1955); *Hernandez* v. *Texas,* 347 U.S. 475 (1954); *Patton* v. *Mississippi,* 332 U.S. 463 (1947); *Hill* v. *Texas,* 316 U.S. 400 (1942)). Where there is no total exclusion of a race, or other identifiable class, a challenge based on partial exclusion must withstand the test of the *prima facie* standard. The basic elements of the *prima facie* test are: (1) that discrimination be alleged and that it be demonstrated to be purposeful; (2) that the class claiming to be excluded forms a substantial and identifiable segment of the population with some members of the class qualified to serve as jurors; (3) that there has been a significant disparity between the members of the class actually serving as jurors and the numbers in the general population; (4) that the disparity has been continued over an extended period of time; and (5) that either the specific harm incurred by the discrimination be shown or that standing to raise the issue of discrimination be demonstrated, especially in challenges not involving racial discrimination (see Comment, *The Civil Petitioner's Right to Representative Grand Juries and a Statistical Method of*

Showing Discrimination in Jury Selection Cases Generally, 20 UCLA L. Rev. 581, 586-587 (1973)). The defendant here has arguably passed elements (2), (3) and (4) of the test, but he has not at any point demonstrated that the alleged discrimination was purposeful, nor has he demonstrated his standing to raise the issue, nor has he pointed to any specific prejudice that flowed to him from the alleged discrimination.

Judge Backus testified that he did not consider age as a factor in selecting potential grand jurors, and he did not believe that the economic standing in the community had any particular relevance, and he was generally unaware of the economic standing of the persons selected for the master grand jury list. This evidence falls far short of any demonstrated intentional or purposeful discrimination on the part of Judge Backus in developing a master grand jury list. The defendant, as pointed out above, has also not demonstrated that he has standing to raise this allegation or that there was any specific harm or prejudice to him from the exclusion or underrepresentation of these classes on the master grand jury list.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert E. Shepherd, Jr., Assistant Attorney General of Virginia, counsel for the respondent in the captioned matter and a member of the bar of the Supreme Court of the United States, do hereby certify that on the 23rd day of December, 1974, I mailed copies of the foregoing Brief for the Respondent in Opposition to the Granting of a Petition for a Writ of Certiorari to James M. Lowe, Esquire, 117 North Fairfax Street, Alexandria, Virginia 22314, counsel for petitioner.

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